However, the proposed amended complaint sets forth the same claim regarding access

1 2 3 4 IN THE UNITED STATES DISTRICT COURT 5 6 FOR THE NORTHERN DISTRICT OF CALIFORNIA 7 8 LARRY HISTON, No. C 11-5210 JSW (PR) 9 ORDER GRANTING MOTION Plaintiff. 10 FOR STAY AND FOR VS. EXTENSION OF TIME: 11 DENYING MOTION FOR KELLY MITCHELL. LEAVE TO AMEND 12 Defendant. (Docket No. 20, 21, 22, 25) 13 14 Plaintiff, an inmate at San Quentin State Prison, has filed this pro se civil rights 15 complaint under 42 U.S.C. § 1983 alleging that defendant deprived him of his 16 constitutional right of access to the court. Defendant filed a motion to dismiss the 17 complaint on the grounds that it does not state a cognizable claim for relief under Rule 18 12(b)(6) of the Federal Rules of Civil Procedure. Defendant has also filed a motion to 19 stay discovery until that motion has been decided. Meanwhile, Plaintiff filed a motion 20 for leave to amend his complaint. Plaintiff has also filed a motion for an extension of 21 time in which to file an opposition to Defendant's motion. 22 Plaintiff's motion for leave to amend was not entered on the docket until the 23 same day that Defendant filed his motion to dismiss. Consequently, Defendant's 24 motion to dismiss only addresses the original complaint, not the proposed amended 25 complaint or Plaintiff's request to file the amended complaint. Ordinarily leave to file 26 the amended complaint would be granted under Federal Rule of Civil Procedure 15(a). 27

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to courts as the original complaint; the only change Plaintiff wants to make is to add a new form of relief. Therefore, if Defendant's argument in his motion to dismiss that the claim is not cognizable is valid, the proposed amended complaint would be an exercise in futility because it be asserting an invalid claim. Consequently, the Court will resolve the arguments in the motion to dismiss first, and then, if the motion to dismiss is denied, grant Plaintiff leave to file the amended complaint.

Accordingly, Plaintiff's motion for leave to file an amended complaint is DENIED without prejudice to the Court's sua sponte reconsideration if and when Defendant's motion to dismiss is denied. (Docket No. 20.) Plaintiff's motion to replace a page of the proposed amended complaint is GRANTED. (Docket No. 21.) Defendant's motion to stay discovery is GRANTED and discovery is STAYED until Defendant's motion to dismiss is resolved. (Docket No. 22.) Plaintiff's motion for an extension of time, to and including April 25, 2012, in which to file an opposition to Defendant's motion to dismiss is GRANTED. (Docket No. 25.) No further extensions of time will be granted. Defendant **shall** file a reply brief within **14 days** of the date the opposition is filed.

IT IS SO ORDERED.

DATED: April 9, 2012

United States District Judge

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2	UNITED STATES DISTRICT COURT
3	FOR THE
4	NORTHERN DISTRICT OF CALIFORNIA
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6	LARRY HISTON, Cose Number CV11 05210 ISW
7	Case Number: CV11-05210 JSW
8	v. CERTIFICATE OF SERVICE
9	KELLY MITCHELL et al,
10	Defendant.
11	
12	I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13	Court, Northern District of California.
14	That on April 9, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
15	receptacle located in the Clerk's office.
16	
17	Larry Histon J-79124 1N/89L
18	San Quentin State Prison
19	Dated: April 9, 2012  Change Ottoba
20	Richard W. Wieking, Clerk By: Jennifer Ottolini, Deputy Clerk
21	By. Jenniner Ottomin, Deputy Cierk
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